

Proper Worker Classification

IRS National Phone Forum
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A Note Before We Begin ...

- This presentation is designed to provide information – not a specific determination for your situation.
- Worker classification determinations are made on a case by case basis, depending on the specific facts and circumstances.



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Basic Definitions

Employee:

An individual who performs services for you who is subject to your control regarding what will be done AND how it will be done (Treas. Reg 31.3121(d)-1(c)(1))

Independent Contractor:

An individual who performs services for you – but you control only the result of the work.



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Employee vs. Independent Contractor

Categories of Evidence:

1. Behavioral control
2. Financial control
3. Type of relationship of the parties



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Behavioral Control

- Type of instruction given
- Degree of instruction
- Evaluation systems
- Training provided by the business



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Behavioral Control

The key fact to consider is whether the business retains the **RIGHT** to control the worker regardless of whether the business actually exercises that right.



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Financial Control

- Significant investment?
- Unreimbursed expenses?
- Opportunity for profit or loss?
- Services available to the market?
- Method of payment?



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Type of Relationship

- Is there a written contract?
- Are employee-type benefits provided?
- Permanency of the relationship?
- Are services provided a key activity of the business?



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What if I'm Still Not Sure?

- File Form SS-8 with IRS
- At least 6 months to process



Form SS-8
(Rev. January 2001)
Department of the Treasury
Internal Revenue Service

**Determination of Worker Status
for Purposes of Federal Employment Taxes
and Income Tax Withholding**

CMB No. 1545-0004

Name of firm (or person) for whom the worker performed services: _____

Worker's name: _____

Firm's address (include street address, apt. or suite no., city, state, and ZIP code): _____

Worker's address (include street address, apt. or suite no., city, state, and ZIP code): _____

Trade name: _____

Telephone number (include area code): _____

Worker's telephone number (include area code): _____

Worker's social security number: _____

Firm's employer identification number: _____

Worker's employer identification number (if any): _____

Important Information Needed To Process Your Request.

If this form is being completed by the worker, the IRS must have your permission to disclose your name to the firm. Do you object to disclosing your name and the information on this form to the firm? ☐ Yes ☐ No

If you answered "Yes" or did not check a box, stop here. The IRS cannot act on your request and a determination will not be issued.

You must answer ALL items OR mark them "unknown" or "Does not apply." If you need more space, attach another sheet.

A. This form is being completed by: ☐ Firm ☐ Worker for services performed beginning (date) _____ to (ending date) _____

B. Explain your reason(s) for filing this form (e.g., you received a bill from the IRS, you believe you received a Form 1099 or Form W-2 erroneously, you are unable to get worker's compensation benefits, you were audited or are being audited by the IRS). _____

C. Total number of workers who performed or are performing the same or similar services: _____

D. How did the worker obtain the job? ☐ Application ☐ Bid ☐ Employment Agency ☐ Other (specify) _____

E. Attach copies of all supporting documentation (contracts, invoices, memos, Forms W-2, Forms 1099, IRS closing agreements, IRS rulings, etc.). In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue \$ _____.

F. Describe the firm's business. _____

G. Describe the work done by the worker and provide the worker's job title. _____

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New: Form 8919

Misclassified workers report their share of Social Security and Medicare on Form 8919



Form 8919
Department of the Treasury
Internal Revenue Service

Uncollected Social Security and Medicare Tax on Wages

CMB No. 1545-0074

Attachment Sequence No. **07**

Form 8919-07

Name of person who must file this form. If married, complete a separate Form 8919 for each spouse who must file this form. Social security number _____

Who must file. You must file Form 8919 if all of the following apply:

- You performed services for a firm.
- The firm did not withhold your share of social security and Medicare taxes from your pay.
- Your pay from the firm was not for services as an independent contractor.
- One or more of the reasons listed below under Reason codes apply to you.

Reason codes: For each firm listed below, enter the applicable reason code(s) for filing this form in column (5). If none of the reason codes apply to you, but you believe you should have been treated as an employee, enter reason code G, and file Form 8919 on or before the date you file your tax return.

A. I filed Form SS-8 and received a determination letter stating that I am an employee of this firm.

B. I was designated as a "section 530 employee" by my employer or by the IRS prior to January 1, 1997.

C. I received other correspondence from the IRS that states I am an employee.

D. I was previously treated as an employee by this firm and am performing services in a substantially similar capacity and under substantially similar direction and control. (You must also enter reason code G.)

E. My co-workers, performing substantially similar services under substantially similar direction and control, are treated as employees. (You must also enter reason code G.)

F. My co-workers, performing substantially similar services under substantially similar direction and control, filed Form SS-8 for this firm and received a determination that they were employees. (You must also enter reason code G.)

G. I filed Form SS-8 with the IRS and have not received a reply.

(1) Name of firm	(2) Firm's Social Security identification number (see instructions)	(3) Enter reason code(s) from above	(4) Enter RRT information or correspondence rate (see instructions)	(5) Check if firm (1099-MISC) was received (see instructions)	(6) Total wages received with no social security or Medicare tax withholding and not reported on Form W-2
1				<input type="checkbox"/>	
2				<input type="checkbox"/>	
3				<input type="checkbox"/>	
4				<input type="checkbox"/>	

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Officer Compensation

- Officers are defined as employees for FICA, FUTA and income tax withholding - IRC 3121(d)(1)
- Officers are not considered employees if:
 - They perform no services or only minor services
 - They are not entitled to remuneration (direct or indirect)



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Officer Compensation

Compensation can include:

- Distributions
- Loans to shareholders
- Payments of personal expenses
- Excessive rent payments
- Management Fees
- Fringe Benefits



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Misclassification of Workers

- What if workers have been incorrectly classified?
- Does Section 530 relief apply?



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Section 530 Relief Requirements

Three requirements must be met to receive relief:

- Reporting consistency
- Substantive consistency
- Reasonable basis



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Section 530 - Consistency

The business must meet **both** consistency requirements:

- Treat all workers in similar positions the same (substantive consistency)
- File all required returns – for example, Form 1099-MISC (reporting consistency)



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Section 530 - Reasonable Basis

The business must have a **reasonable basis** for not treating the workers as employees:

- judicial precedent
- prior audit
- industry practice
- other reasonable basis



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Resources

- IRS Web site - www.irs.gov
 - Type keywords “worker classification” in search box
 - Handout with worker classification links
- Pub 1779 - Independent Contractor or Employee
- Form SS-8, Determination of Worker Status
- Pub 1976, Section 530 Relief Requirements

